

1 case, but unless something comes --

2 I'll qualify that, but depending on what the  
3 records show, but we're not going to -- The point is that  
4 the purpose of the hearing and the purpose of the  
5 questioning is not to establish a violation other than what  
6 we're litigating today. Go ahead.

7 MR. SHOOK: Your Honor, I had finished with that  
8 line of questioning anyway.

9 JUDGE SIPPEL: All right.

10 (Pause)

11 MR. SHOOK: Your Honor, I stand corrected. I do  
12 have one or two more questions along that line.

13 JUDGE SIPPEL: Go ahead. Go ahead.

14 BY MR. SHOOK:

15 Q Mr. Becker, with respect to the KPEN studio, is  
16 there a telephone line that is local to the Kenai and  
17 Soldotna area that goes to that office?

18 A Yes.

19 Q Is that number answered by someone in the Kenai or  
20 Soldotna office? I don't know where this location is.  
21 Perhaps you should clarify that first, whether we're talking  
22 the office location is in Kenai or Soldotna.

23 A It's located in Kenai

24 Q With respect to that Kenai office, is there  
25 somebody there who actually answers the phone, or does the

1 phone message get transmitted to some other location?

2 A We have two numbers, 283-7423 and, actually three  
3 numbers, 283-8706 ring into the Kenai office. That's a 283  
4 exchange. Those are for Gary, Gary Hondell and Terry Coval.  
5 262-6000 rings in to our Homer office, and that's a Soldotna  
6 line.

7 MR. SHOOK: Your Honor, I want to check on  
8 something. I don't know whether there was actually an  
9 answer to this particular question and that is whether there  
10 was any local programming done at the KPEN studio.

11 MR. SOUTHMAYD: Your Honor, I want to object. I  
12 think the question is vague, particularly with regard to  
13 what's considered local programming.

14 JUDGE SIPPEL: Well let's see what the witness can  
15 do with the question. Mr. Becker?

16 THE WITNESS: Yes, sir.

17 JUDGE SIPPEL: Do you know what you're being  
18 asked?

19 THE WITNESS: I would like to know how you define  
20 local programming.

21 MR. SHOOK: In this particular case, whether there  
22 is an individual who would appear at that location and  
23 actually conduct programming of any kind, **be** it an interview  
24 of a local resident, be it a disc jockey who uses that  
25 location for his program. That's what I have in mind.

THE WITNESS: We have capability of doing that.

2 We do not currently schedule any local programming at this  
3 time.

4 BY MR. SHOOK:

5 Q And one final question. When was the last time it  
6 was used for local programming?

7 A I don't know.

8 Q Do you hold the ultimate decisionmaking authority  
9 at Peninsula?

10 A In general, yes, although my wife is involved in  
11 some decisions.

12 Q What would the category of decisions be that your  
13 wife is normally involved with?

14 A Primarily large purchases of significant amount of  
15 money. She would want to know.

16 Q So is the general proposition we're talking about  
17 land or a sizeable building or a sizeable piece of  
18 equipment?

19 A Yes.

20 Q Is there a dollar limitation in terms of when she  
21 becomes involved?

22 A No.

23 Q Now in light of the previous answers, would it be  
24 fair to say that as a general proposition, you have always  
25 held the ultimate decisionmaking authority at Peninsula?

1           A     I would say no. My wife is still involved. I  
2 would have to discuss things with her, but we mutually  
3 discuss major decisions. I make most of them, but she is  
4 not totally out of the loop.

5           Q     Going back to 1982, Peninsula applied for a new FM  
6 translator to serve Kenai and Soldotna at that time,  
7 correct?

8           A     I believe so.

9           Q     Would it be fair to say that you thought the  
10 Commission should approve Peninsula's application for the  
11 Kenai Soldotna translator because the Commission had  
12 declined to terminate KSRM Inc.'s translator in Homer?

13          A     That was a factor.

14          Q     Do you have a set of the official notice documents  
15 in front of you?

16               MR. SOUTHMAYD: If I could approach my witness,  
17 I'll --

18               JUDGE SIPPEL: Sure. Certainly, Mr. Southmayd.

19               BY MR. SHOOK:

20          Q     I direct your attention to a document titled  
21 Notice of Inquiry in the Matter of Amendment of Part 74 Of  
22 the Commission's rules concerning FM translator stations, MM  
23 Docket Number 88-140 released June 2, 1988.

24               JUDGE SIPPEL: Do you have a tab number on that  
25 one?

1 MR. SHOOK: It's tabbed as Official Notice Exhibit  
2 2.

3 JUDGE SIPPEL: Okay. The witness has it in front  
4 of him.

5 BY MR. SHOOK:

6 Q Have you ever read this document in whole or in  
7 part before?

8 A In part.

9 Q Approximately when?

10 A I don't know.

11 Q Was it shortly after it was released?

12 A Most likely not.

13 Q When would you have first read it, most likely?

14 MR. SOUTHMAYD: Your Honor, he's indicated he  
15 doesn't know when he read it.

16 JUDGE SIPPEL: He didn't say that yet.

17 THE WITNESS: I don't know.

18 JUDGE SIPPEL: He has now.

19 BY MR. SHOOK:

20 Q Did Peninsula file comments in response to the  
21 notice of inquiry?

22 A No.

23 Q I next direct your attention to a document titled  
24 Not ce of Proposed Rulemaking. It's been tabbed as Official  
25 Not ce Exhibit 3.

1           A     Yes.

2           Q     Have you ever read this document in whole or in  
3 part before?

4           A     In part.

5           Q     Approximately when?

6           A     I don't know.

7           Q     Did Peninsula file comments in response to the  
8 notice of proposed rulemaking?

9           A     No.

10          Q     I next direct your attention to what has been  
11 tabbed as Official Notice Exhibit 4. It's a document titled  
12 Report and Order in MM Docket Number 88-140 released  
13 December 4, 1990.

14          A     Yes.

15          Q     Have you ever read this document before in whole  
16 or in part?

17          A     In part.

18          Q     Approximately when?

19          A     Approximately between '95 and '96 when this  
20 translator issue became a factor, to the best of my  
21 knowledge. I'm not real clear on that.

22          Q     All right. So you're stating that this document  
23 which was released in 1990 *you* first read in part sometime  
24 between 1995 and 1996?

25          A     I believe so, but I don't know.

1           Q     Subsequent to the release of the report and order,  
2     did Peninsula seek a waiver of the amended version of  
3     Section 74.1232d of the Commission's rules for any of its  
4     translators?

5           A     No, because the footnote 59 in the order states we  
6     intend that our decisions herein not alter in any fashion  
7     the special treatment we accord Alaska Rangel Radio Group.  
8     Upon appropriate showing, the Commission has accommodated  
9     Alaska's unique lack of adequate communications services by  
10    granting waivers allowing program origination, alternative  
11    signal delivery and cross-service translating. The order  
12    did not contain any requirement to reseek waivers that had  
13    previously been granted.

14           MR. SHOOK: Your Honor, I would move to strike  
15    everything after the word No.

16           MR. SOUTHMAYD: Your Honor, it's completely  
17    responsive to his question. He asked, and we could read the  
18    question back, but if he had filed any applications and his  
19    answer was no, we didn't need to and here's why.

20           JUDGE SIPPEL: I'm going to sustain. I'm going to  
21    permit the answer to remain as given.

22           BY MR. SHOOK:

23           Q     I direct your attention now to what has been  
24    tabbed as Official Notice Exhibit 6. It's a memorandum,  
25    opinion and order in MM Docket 88-140 released July 28,

1 1993.

2 A Yes.

3 Q Have you ever read this document in whole or in  
4 part?

5 A In part.

6 Q Approximately when?

7 A I don't know.

8 Q Subsequent to the release of the memorandum,  
9 opinion and order tabbed as Official Notice Exhibit 6, did  
10 Peninsula seek a waiver of Section 74.1232d of the  
11 Commission's rules for any of its translators?

12 A No, and for the same answer I gave before, we did  
13 not understand that a waiver was, it was necessary to  
14 reapply for any previous waivers that were already granted  
15 pursuant to Rangel.

16 Q Do you know John Davis of KSRM, Inc.?

17 A Yes.

18 Q And how long have you known Mr. Davis?

19 A Approximately 23 years.

20 Q Is KSRM, Inc. currently a business competitor Of  
21 Peninsula?

22 A Yes.

23 Q Approximately how long has KSRM, Inc. been a  
24 business competitor of Peninsula?

25 A Since Peninsula has been in business, since 1979.



1           Q     KSRM operated a translator in Homer for  
2 approximately 15 years, correct?

3           A     I don't know the exact dates, but that's roughly  
4 the time frame.

5           Q     What is your recollection of what that time frame  
6 was?

7           A     Um, 1979 they were on, went on the air about a  
8 month before we started up our operation and my recollection  
9 would be about August of '79. Let me clarify that a little  
10 bit. He had attempted to get his translator working before  
11 we went on the air and he was having a number of  
12 difficulties with it because they actually in fact brought  
13 their translator to me to fix it and I worked on his  
14 translator, but it didn't really start operating properly  
15 until, my recollection would be around August **of** '79 and I  
16 believe he ran it through May of '94, roughly.

17          Q     During the period that KSRM, Inc. operated its  
18 translator in Homer, did Peninsula compete with KSRM, Inc.  
19 for radio advertising in Homer?

20          A     Peninsula was licensed. Our station was licensed  
21 to Homer. Certainly. Yes.

22          Q     During the period that KSRM, Inc. operated its  
23 translator in Homer, was it your understanding that KSRM.  
24 Inc. had a measurable market share *of* the radio audience in  
25 Homer?

A Yes.

2 Q During the period that KSRM, Inc. operated its  
3 translator in Homer, did you believe that its operation hurt  
4 Peninsula financially?

5 A That was the -- I would say yes because that was  
6 the basis of our initial petition that we filed in 1980 if I  
7 remember, seeking the termination of the translator.

8 Q When KSRM, Inc. stopped operating its translator  
9 in Homer in 1994, did you learn why KSRM, Inc. stopped  
10 operating the translator?

11 A No.

12 Q When KSRM, Inc. stopped operating **its** translator  
13 in Homer in 1994, did you become aware of that cessation of  
14 operation about the time that it occurred?

15 A Yes.

16 Q And what understanding, if any, did you have as to  
17 why the operation stopped?

18 A My speculation would be, since I don't know why,  
19 they never told me why they turned it off, my speculation  
20 would be they believed that they had to pursuant to this 91  
21 report and order. However, my belief was that they could  
22 have kept it on due to the Rangel exception under footnote  
23 59.

24 Q And that was your belief in 1994?

25 A Yes, because we had licenses which were good

through '96. Their licenses I would assume were good  
2 through '96 as well because we had the same renewal cycle,  
3 so my speculation is he voluntarily turned it off due to  
4 some misconception about this order.

5 Q So that's your understanding and it's based on  
6 inferences that you're drawing from the actions taken?

7 A He turned it off. I kept mine on because my  
8 belief was that I had permission to operate through February  
9 of '96, the licenses were good to that date. I had never  
10 received a notice from the FCC telling me otherwise,  
11 therefore I believed that I had the right to continue to  
12 operate.

13 Q When you say you never received a notice, you're  
14 referring to a letter addressed to Peninsula from the  
15 Commission?

16 A Yes. Yes. My authorizations were good through  
17 February of '96.

18 Q You're not referring to the report and order **or**  
19 the --

20 A No.

21 Q -- memorandum of opinion and order dealing with  
22 that on recon?

23 A That memorandum opinion and order contained  
24 footnote 59 which said that it did not alter in any fashion  
25 the special treatment accorded Alaska and based on that,

1     that's what this whole case is about is footnote 59, the  
2     Alaska exception.

3             JUDGE SIPPEL: Footnote 59 to what?

4             THE WITNESS: Report and order 91, sir. I believe  
5     it's 90-375. Yes. Page 7245 in the record.

6             (Pause)

7             JUDGE SIPPEL: Okay. Go ahead.

8             BY MR. SHOOK:

9             Q     Does Peninsula currently operate an FM translator  
10     that provides programming to the residents of Kenai on FM  
11     channel 285?

12            A     Yes. We don't. Now we don't. We're off the air.

13            Q     For purposes of the next couple of questions, I'll  
14     refer to it as the Kenai translator.

15            A     Um-hmm.

16            Q     When did Peninsula stop operating the Kenai  
17     translator?

18            A     August 28, 2002.

19            Q     Why did Peninsula stop operating the Kenai  
20     translator?

21            A     The Enforcement Bureau started a proceeding in the  
22     Alaska District Court seeking an injunction to force the  
23     termination of our translators. That proceeding resulted in  
24     an injunction being issued around October, I don't have the  
25     exact date, of 2001. Peninsula immediately appealed the

1 order from the Alaska District Court to the Ninth Circuit  
2 Court of Appeals. The Ninth Circuit within about three days  
3 of my recollection issued a stay of the injunction.

4 The stay was a preliminary stay which I believe  
5 ran through in effect through April of 2002. The court, the  
6 Ninth Circuit, upheld the injunction. Peninsula filed a  
7 petition for rehearing and a petition en banc immediately  
8 after that, and the Ninth Circuit upheld the stay and then  
9 they essentially issued a mandate which upon agreement with  
10 the US District Attorney, we arrived at a turnoff date which  
11 was August 28th by mutual agreement and then Peninsula  
12 complied with the August 28 agreed upon turnoff date and at  
13 that point, we ceased operation.

14 Q Did Peninsula operate the Kenai translator  
15 continuously from May 19, 2001 to August 28, 2002?

16 A Yes, we did.

17 Q Did Peninsula's operation of the Kenai translator  
18 during this period -

19 A Excuse me.

20 Q Yes, sir.

21 A Did I clarify that? What was the dates you said?

22 Q May 19, 2001 to August 28, 2002?

23 A Yes.

24 Q Did Peninsula's operation of the Kenai translator  
25 during the period that I just referred to result in any

1 revenue for Peninsula?

2 A Yes.

3 Q Do you know approximately how much revenue per  
4 month resulted?

5 A No.

6 Q Did Peninsula's operation of the Kenai translator  
7 result in any expenses for Peninsula during that period?

8 A Yes, some expenses.

9 Q Do you know approximately how much it cost  
10 Peninsula per month to operate the translator?

11 A We have a rough idea of basic costs, electricity  
12 and so forth.

13 Q Do you have any knowledge as to whether  
14 Peninsula's operation of the Kenai translator has been  
15 profitable for Peninsula since May 19, 2001?

16 A The profitability of our operation is a sum total  
17 of all the individual component parts. I furnished the  
18 Bureau with our income and our expense statement which I  
19 note you have as an exhibit and which I would also like to  
20 request that it be held confidential.

21 Our operation overall lost money for the previous  
22 fiscal year, approximately \$30,000, so we took in less money  
23 than what our expenses amounted to for the previous fiscal  
24 year which included the operation of that translator.

25 Q In response to not the answer you just gave but to

1 the question before when you said you had an understanding  
2 or you had an idea of what the basic costs of operation of  
3 the translator were, could you tell us what those costs  
4 were?

5 A You're referring to Kenai?

6 Q Yes, sir

7 A Yeah. Essentially it's the power to run the  
8 station.

9 Q Which is approximately how much per month?

10 A I couldn't tell you off the top of my head. The  
11 electric bill includes other items, so I don't know.

12 Q In other words, you receive one electric bill that  
13 covers the multiplicity of --

14 A Yes.

15 Q -- operations? From May 19, 2001 to August 28,  
16 2002, did the Kenai translator retransmit a broadcast  
17 station license to Peninsula?

18 A Yes.

19 Q Which station was that?

20 A KWVW-FM.

21 Q Had the Kenai translator retransmitted KW-FM  
22 from the time the Kenai translator first began operations?

23 A Yes.

24 Q Did the operation of the Kenai translator have any  
25 impact on the number of listeners for KW-FM?

1           A     That's difficult to assess.

2           Q     What would your opinion be?

3           A     The market is rated with Arbitron, a well-known  
4 rating service. The Arbitron ratings only reflect listening  
5 that is reported for a radio station of a given call  
6 letters.

7                     The listener often does not know if he's listening  
8 to the primary station or to a translator because the  
9 station is identified as the primary station, so the  
10 listening that gets reported would reflect the primary  
11 station and would be very difficult to break out and I don't  
12 think it's possible to break out individual audience share  
13 for a given translator because it's not, the survey doesn't  
14 do that.

15          Q     The survey is meant to cover listening on a  
16 Peninsula-wide basis, or **is** it meant to cover a different  
17 geographic area?

18          A     The Arbitron rates primarily the Anchorage metro  
19 and then breaks out as county-wide coverage the Mannanaska-  
20 Cissetna [phonetic] burrough and then also the Kenai  
21 Peninsula burrough as **a** separate entity, and so it includes  
22 the entire Kenai Peninsula burrough listening.

23          Q     And from those numbers, can you, the **numbers** that  
24 appear on the survey, can you deduce what percentage would  
25 come from --



1           A     -- everywhere to various random zip codes on the  
2 peninsula and short of going to Arbitron's file room and  
3 looking at the diaries, you wouldn't know where they were,  
4 where they came from.

5           Q     It would be reasonable to assume, however, that a  
6 certain percentage of your listeners, listeners for KWVW-FM  
7 resided in the Kenai area?

8           A     They reside everywhere on the peninsula. I don't  
9 know what percentage comes from Kenai or Soldotna or Seward.

10          Q     Now from May 19, 2001 to August 28, 2002, would  
11 you agree that the operation of the Kenai translator was  
12 inconsistent with Section 74.1232d of the Commission's  
13 rules?

14          A     Our position is that our Rangel Radio Group  
15 waivers still are in effect and therefore it may be  
16 inconsistent, however, we were granted waivers by the  
17 Commission by virtue of the fact they granted us licenses  
18 and so our position is that our Rangel Radio Group waivers  
19 are still in effect and therefore we have authorization to  
20 continue to broadcast on these translators.

21          Q     Has Peninsula ever received from the Commission or  
22 its staff a written waiver to operate the Kenai translator  
23 at variance with the current version of Section 74.1232d of  
24 the Commission's rules?

25          A     Repeat the question?

1           Q     Has Peninsula ever received from the Commission or  
2     its staff a written waiver to operate the Kenai translator  
3     at variance with the current version of Section 74.1232d of  
4     the Commission's rules?

5           A     I believe we received waivers prior to the current  
6     version. We did not reapply for any waivers for the current  
7     version because we did not see the, a necessity to do so.

8           Q     So in other words, the response to my question is  
9     no?

10          A     We have not received anything in response to the  
11     current version. That would be correct.

12          Q     I want you to refer to the binder of Enforcement  
13     Bureau exhibits, and where I want you to look is, it's under  
14     the tab 7.

15               MR. SOUTHMAYD: Excuse me, counsel, is this  
16     Official Notice 7 or your Exhibit 7?

17               MR. SHOOK: No, it's the Enforcement Bureau  
18     exhibits, that set.

19               BY MR. SHOOK:

20          Q     Could you identify for us, please, what appears as  
21     the first seven pages of that exhibit?

22               MR. SOUTHMAYD: Your Honor, we're going to object  
23     to and do object to all of the proposed exhibits tendered by  
24     the Enforcement Bureau that contain merely portions of the  
25     license files for these translators.

1           In each case, there were applications filed,  
2       amendments filed, authorizations issued and the Bureau's  
3       exhibits collectively submit only certain applications and  
4       certain authorizations. It's as if they're, they have a 10-  
5       page letter to submit as an exhibit but they only submit the  
6       even numbered pages.

7           It's not a complete record of the license file.  
8       We don't object to these exhibits to the extent that they're  
9       complete license files and completely and accurately reflect  
10      the applications filed by Mr. Becker's company, the waivers  
11      granted and so forth, but tailoring these license files to  
12      only contain applications that support their case but  
13      inaccurately reflect the applications filed by Peninsula is  
14      factually inaccurate.

15           It makes for an inaccurate record and it  
16      misrepresents materials in the license files, and we object  
17      to them taking that approach.

18           MR. SHOOK: Your Honor, aside from the various  
19      characterizations, I certainly have no objection to Mr.  
20      Southmayd deciding for Peninsula what other portions of any  
21      particular application file or license file should be made a  
22      part of the record. The particular documents that I'm going  
23      to be referencing I believe will stand on their own merit in  
24      terms of whether **or** not they should be received into  
25      evidence and as far as any other documents are concerned,

the Bureau made the decision that such documents were not  
2 needed for this record.

3           Now obviously Peninsula may disagree and want to  
4 have additional documents from the license files as part of  
5 the record. Should it wish to do so, we have no objection  
6 to that assuming that the material is relevant, but we've  
7 made our initial determination as to what is relevant and  
8 this is what's here.

9           JUDGE SIPPEL: Okay. What was the exchange date  
10 on these exhibits? Was it the 19th?

11           MR. SHOOK: I believe the exchange date was the  
12 12th.

13           JUDGE SIPPEL: The 12th. And what the Bureau did  
14 was selectively take out portions of applications that were  
15 relevant to the issue and to the question. Is that right?

16           MR. SHOOK: Yes, sir. I'll certainly acknowledge  
17 one aspect of what Mr. Southmayd is arguing and that is that  
18 there are additional materials with respect to every single  
19 file, but looking through those materials, we did not see  
20 the point or the need to have every single piece of paper  
21 from a license file inserted into this record. We  
22 understand that Mr. Southmayd may disagree with that  
23 judgment

24           We're willing to, you know, see whatever it is  
25 that he wishes to introduce to supplement what he perceives

1 to be an incomplete record, but that doesn't have anything  
2 to do with the accuracy of the documents that are part of  
3 the exhibit or the relevance of those documents.

4 MR. SOUTHMAYD: Your Honor, for example, in this  
5 exhibit we've just turned to, Exhibit Number 7, it contains  
6 various applications. This is actually a bad example.  
7 There's only one thing missing from this exhibit, but there,  
8 in other exhibits there are the majority, including the  
9 original application filed with a waiver request that's  
10 omitted.

11 The only thing we're asking is if the Bureau who's  
12 in control of these records which we asked for during  
13 discovery and were denied the opportunity to have, to get  
14 from the Bureau, subject to going into the reference room  
15 ourselves, if they want to put a license file into the  
16 record, we don't object, but it should be complete.

17 We should have a complete record of what  
18 Peninsula's applied for, what the Commission's approved, not  
19 selectively nitpicking things that don't accurately reflect  
20 the basis for Commission licensing of these translators.

21 That's my only point, and I would be glad to  
22 supply the Bureau with that if they choose not to complete a  
23 full record, but it's only fair. If we're going to put  
24 license files in here, let's have the whole record.

25 JUDGE SIPPEL: Well but what am I supposed to do

1 with them all? I mean as far as findings are concerned?

2 MR. SOUTHMAYD: You will have a complete record of  
3 these license files that are the basis for the licenses that  
4 were issued to Mr. Becker.

5 JUDGE SIPPEL: Is that really, is it really an  
6 issue as to whether or not he was issued licenses at any  
7 particular point in time?

8 MR. SOUTHMAYD: Not the licenses themselves but  
9 the terms on which they were issued, which are contained in  
10 the applications. For example, in all of these  
11 applications, **Mr.** Becker requested waivers **of** the  
12 Commission's rules. The licenses were issued pursuant to  
13 those applications. In some cases, the Commission issued  
14 letters and said we grant your waivers and here's our  
15 rationale. In some cases, they didn't issue letters but  
16 they issued the license pursuant to the waiver applications  
17 that had been filed.

18 If you don't put the applications in with the  
19 waivers, then from the face of the license, it could be  
20 inferred Peninsula didn't request these waivers and they  
21 weren't granted because there's no letter that corresponds  
22 to the waiver.

23 JUDGE SIPPEL: Oh, I see. You're saying that  
24 there's nothing in this, let's say, let's take Exhibit, or  
25 whatever exhibit, whatever it is, it's a hypothetical let's

1 say, hypothetically it happened in number seven, but there  
2 was a request for a waiver along with the application and  
3 the license was granted or what action was taken, a license  
4 was granted without a waiver.

5 MR. SOUTHMAYD: Well referencing the waiver.

6 JUDGE SIPPEL: Referencing the waiver, so that  
7 this document would not explain the whole set of  
8 circumstances in terms of what he was intending to do.

9 MR. SOUTHMAYD: And in fact what had been  
10 approved.

11 JUDGE SIPPEL: I'll tell you how you can  
12 straighten it out. How we would straighten it out is that  
13 we could allow a reasonable rebuttal period for you to take  
14 these exhibits one at a time and submit what you feel it is  
15 that is needed to supplement that, you know, again, material  
16 that was left out that you feel should be left in for a  
17 specific purpose. I mean, you want to use it as rebuttal to  
18 the extent that the document, you contend the document does  
19 not fully reflect what happened and that it is necessary to  
20 show, to fully reflect what happened in order for this  
21 evidence to have relevance.

22 MR. SOUTHMAYD: Correct, Your Honor.

23 JUDGE SIPPEL: You know, it's not a question of  
24 just being sure that every lick of paper is in an exhibit.  
25 You have to have a reason for why.

1 MR. SOUTHMAYD: Right.

2 JUDGE SIPPEL: I'll permit you to do that. This  
3 goes back to the same general requirement to the hearsay  
4 exception. If you put a part of a document in, the other  
5 side has the opportunity to put the whole document in in  
6 order to make it, tell what it really purports to, you know,  
7 state exactly what it's supposed to be.

8 MR. SOUTHMAYD: That would be fine and on that  
9 basis, I withdraw my objection to these exhibits.

10 JUDGE SIPPEL: We'll have to work that out when it  
11 comes to the schedule.

12 MR. SOUTHMAYD: Yes, sir.

13 JUDGE SIPPEL: But you'll have, I'm also going to  
14 require that you set out specifically with respect to each  
15 exhibit exactly why you feel the supplemental material is  
16 needed.

17 MR. SOUTHMAYD: Yes, sir.

18 JUDGE SIPPEL: And although it's really for, more  
19 for, to fully explain the significance of a document, I will  
20 consider it in the general rubric of rebuttal.

21 MR. SOUTHMAYD: Thank you, Your Honor.

22 JUDGE SIPPEL: Okay? Understand? Is this all  
23 understood?

24 MR. SHOOK: I believe so. I think what Jeff and I  
25 are going to have to do is just make some arrangement **so**



1     that he can have access to the license files and then he can  
2     photocopy from them whatever it is he wishes and then he  
3     would have the opportunity to submit into evidence whatever  
4     portions of those documents or those files, rather, he  
5     believes need to be in the record in order to make the  
6     record accurate.

7             JUDGE SIPPEL: With the justification, and you  
8     will certainly have an opportunity to respond to the  
9     justification, you being the Enforcement Bureau. So we're  
10    going to have to leave the record open a little longer than  
11    ordinarily would be the case to permit this.

12            MR. SHOOK: A matter that I think we should  
13    perhaps give some thought to now is when this occurs because  
14    if we wait too long or if we wait some period of time, then  
15    it certainly extends Mr. Becker's stay, because there's the  
16    possibility that questions would arise from whatever  
17    documents it is that Mr. Southmayd wants to introduce that  
18    they would still need some kind of testimonial supplement  
19    from Mr. Becker.

20            MR. SOUTHMAYD: Well what I would anticipate  
21    would, these would be materials directly out of the  
22    Commission's files.

23            JUDGE SIPPEL: Yes. I hear you.

24            MR. SOUTHMAYD: They would speak for themselves I  
25    would think.

1 JUDGE SIPPEL: Well they would speak for  
2 themselves except that I want to see your explanation --

3 MR. SOUTHMAYD: Yes, sir.

4 JUDGE SIPPEL: -- your rationalization as to what  
5 it is and why I have to think of this in terms of relevance.  
6 My point is this. If somebody wants to take more testimony  
7 to clarify it, I think there's going to have to be a motion,  
8 you know, for leave to do that.

9 I'm not intending to let that happen and I'm  
10 talking about something like, you know, after we finish here  
11 today, 10 more days to get that in and another 10 days for  
12 the Bureau to file any response they want to it which should  
13 not delay or certainly not significantly delay the dates  
14 that I would set for proposed findings.

15 MR. SHOOK: Only for clarification at this point,  
16 my question and I'm really directing it to Mr. Southmayd,  
17 but I want to address the court, is whether or not Mr.  
18 Southmayd has, so far as he knows, complete license files of  
19 the various translators at this stage or is he under the  
20 impression or has the understanding that he is missing  
21 certain documents.

22 MR. SOUTHMAYD: Your Honor, I believe I do, but I  
23 would like to just confirm that in the Commission's own  
24 files.

25 JUDGE SIPPEL: Sure. We're going to let, we're

1 going to have, before this record is closed, I'm going to  
2 have reasonable assurance that everything is complete that's  
3 relevant, and certainly anything that relates to a  
4 particular application that has, you know, that is necessary  
5 in order to consider an application in its full context, Mr.  
6 Southmayd is assuming the burden of pointing this out to me,  
7 I'm certainly going to permit him to do that.

8 Now mechanically, that means that he's got to  
9 double-check against Commission files to make sure he's got  
10 everything. I mean that's certainly reasonable. I would  
11 say that, you know, if you're concerned about a time  
12 slippage here that the Bureau cooperate to the fullest  
13 extent with that mechanical part of what he's doing.

14 MR. SHOOK: I'm not concerned about the timing of  
15 this.

16 JUDGE SIPPEL: I mean it seems to be, I mean if  
17 there's a problem down the road, you'll just have to come  
18 back to me, you know, I don't see this. All right. I don't  
19 know whether I was ruling on an objection **or** what.

20 MR. SOUTHMAYD: I think you did, Your Honor, but  
21 it was withdrawn based on your determination.

22 JUDGE SIPPEL: Okay. So are we back now to Mr.  
23 Shook asking the questions?

24 MR. SHOOK: I believe so.

25 JUDGE SIPPEL: All right, Mr. Shook?

1 BY MR. SHOOK:

2 Q Mr. Becker, before we went off on our little  
3 tangent here, I wanted you to look at the first seven pages  
4 of what has been tabbed as Enforcement Bureau Exhibit 7, and  
5 if you could please identify that material?

6 A It's a form, the cover letter from Southmayd &  
7 Miller, followed by an FCC 303-S, Application for Renewal of  
8 License for AM/FM TV Translator or TV Station, six pages  
9 plus an exhibit.

10 Q With respect to the signature that appears on page  
11 6, is that signature yours?

12 A Yes.

13 Q Turning to page 5, do you see the question and  
14 answer for question 5A?

15 A Yes.

16 Q And you checked the box no?

17 A It's checked no.

18 Q Did KWW --

19 A Excuse me?

20 Q Just a second. Do you have something to add to  
21 that?

22 A Yes, may I say something? It's followed by an  
23 exhibit marked number 1, in response to the answer to 5A.

24 Q You're referring to what appears on page 7?

25 A Yes. So since the answer is no, the exhibit

1 explains why.

2 Q Did KWW-FM compete for market share in Kenai with  
3 KSRM, Inc. stations after May 19, 2001?

4 A Yes.

5 Q Did KWW-FM compete for advertising revenues in  
6 Kenai with KSRM, Inc. stations after May 19, 2001?

7 A Yes.

8 Q Does Peninsula currently operate an FM translator  
9 that provides programming to the residents of Soldotna on  
10 channel 283?

11 A Yes.

12 Q Is that translator still operating?

13 A No.

14 Q So in other words, the question that I had posed  
15 before, does Peninsula currently operate an FM translator  
16 that provides programming for the residents of Soldotna on  
17 channel 283, the correct answer is no?

18 A Yes.

19 Q When did Peninsula stop operating the Soldotna  
20 translator?

21 A August 28, 2002.

22 Q Why did Peninsula stop operating the Soldotna  
23 translator?

24 A The same reason I gave to the other question which  
25 is the injunction finally issued and we were required by the

1 Alaska District Court to turn it off and we complied.

2 Q Did Peninsula operate the Soldotna translator  
3 continuously from May 19, 2001 to August 28, 2002?

4 A Yes.

5 Q Did Peninsula's operation of the Soldotna  
6 translator result in any revenue for Peninsula?

7 A May I say something?

8 Q Yes.

9 A If this is the same line of questioning, I think  
10 my answers would apply to all the translators that are in  
11 question here.

12 Q It is, but I'm going to go through this exercise  
13 unless stopped by the judge in order to make sure that the  
14 record is clear.

15 JUDGE SIPPEL: Well he's going to concede the fact  
16 that all of these translators that are the subject of this  
17 proceeding, which is seven translators as I understand that,  
18 is that correct?

19 THE WITNESS: Yes, sir.

20 JUDGE SIPPEL: And they all ceased operating **on**  
21 the 28th of August for the reason stated, that there was a  
22 final court injunction. That should, that certainly  
23 satisfies me.

24 MR. SHOOK: Very good. There may be some other  
25 questions, though, that are peculiar to each translator, and

1 I want to make sure that the record is clear before we leave  
2 the subject.

3 JUDGE SIPPEL: Well you're free, you're free to do  
4 that, but, you know, as a general proposition, the big  
5 question has been asked and answered and you take it from  
6 there.

7 BY MR. SHOOK:

8 Q Were I to ask you how much did it cost Peninsula  
9 per month to operate each of the other six translators that  
10 we have not gone through yet, would your answer be that  
11 which you had given for the Kenai translator?

12 A I don't recall my answer to the Kenai translator  
13 question.

14 Q Well then I'll ask, I'll ask the question.  
15 Approximately how much has it cost Peninsula **or** did it cost  
16 Peninsula per month to operate the Soldotna translator since  
17 May 19, 2001?

18 A I don't know.

19 Q Did Peninsula's operation of the Soldotna  
20 translator result in expenses for Peninsula?

21 A Yes.

22 Q Did the operation of the Soldotna translator  
23 result in revenue for Peninsula?

24 A It would be the same answer I gave before, the  
25 translators, the revenue that we gained come from sales on

1 the primary station. We cannot, we don't attribute income  
2 to an individual translator because we don't sell time on  
3 individual translators.

4 The parent station is what we sell with signal  
5 that happens to go everywhere that it's carried on the  
6 translator and so therefore you cannot attribute an  
7 individual income amount to an individual translator. We  
8 don't break it out. I don't know how you would figure them  
9 out

10 Q From May 19, 2001 to the termination date, August  
11 28, 2002, did the Soldotna translator retransmit a broadcast  
12 station licensed to Peninsula?

13 A Yes.

14 Q Which station is that?

15 A KWW-FM.

16 Q How long had the Soldotna translator been  
17 retransmitting KW - FM?

18 A Since it went on the air.

19 Q Approximately when was that?

20 A I don't know without looking it up.

21 Q Would that be roughly 1983?

22 A I believe that's accurate.

23 Q Has Peninsula ever received from the Commission or  
24 its staff a written waiver to operate the Soldotna  
25 translator at variance with the current version of Section



1 74.1232d of the Commission's rules?

2 A Peninsula received a waiver when the translator  
3 was originally put on the air. Peninsula had not sought any  
4 rewaiver request, so the rules were changed in the mean time  
5 with the current version of the rules when we did not seek a  
6 waiver of the current version because our belief was our  
7 previous waiver was still in effect.

8 Q The short answer to the question would be no?

9 A Yes.

10 Q I direct your attention to the documents following  
11 EB Exhibit tab 6 and ask you to identify the first seven  
12 pages.

13 A It's a cover letter from Southmayd & Miller,  
14 followed by the application for license renewal and a Form  
15 303S followed by Exhibit 1 in response to and to question  
16 5A.

17 Q Your signature appears on page 6?

18 A Yes.

19 Q And the response you checked to question 5A is no?

20 A Yes.

21 Q Explained by the exhibit that appears on page 7?

22 A Yes.

23 Q Would you agree that if we were to look at the  
24 other five renewal applications that were filed by Peninsula  
25 in 1997 or the other area translators in Kodiak, in Homer,

1 in Anchor Point and in Kachemak City, that you also answered  
2 no to question 5A and included as an explanation the exhibit  
3 that appears at page 7?

4 A I would say that's accurate.

5 MR. SOUTHMAYD: We'd stipulate that, Your Honor

6 JUDGE SIPPEL: I'll accept it if you're willing to  
7 do so.

8 MR. SHOOK: Certainly.

9 JUDGE SIPPEL: Thank you.

10 BY MR. SHOOK:

11 Q Did KWW-FM compete for market share in Soldotna  
12 with KSRM Inc.'s stations after May 19, 2001?

13 A Yes.

14 Q Did KW-FM compete for advertising revenues in  
15 Soldotna with KSRM Inc.'s stations after May 19, 2001?

16 A Yes.

17 MR. SHOOK: Your Honor, in light of the  
18 stipulations, I'm going to try to shortcut the questioning  
19 that I would have done otherwise.

20 JUDGE SIPPEL: Do you want a little time to  
21 reorganize your thoughts, or do you want to just go forward?

22 MR. SHOOK: I'll just go forward.

23 BY MR. SHOOK:

24 Q Now Peninsula currently operates, or excuse me,  
25 does Peninsula currently operate an FM translator that

1 provides programming to the residents of Kodiak on channel  
2 274?

3 A No.

4 Q It stopped on August 28, 2002?

5 A Yes.

6 Q Did Peninsula operate the Kodiak 274 translator  
7 continuously from May 19, 2001 to August 28, 2002?

8 A Yes.

9 Q From May 19, 2001 to the termination date, did the  
10 Kodiak 274 translator retransmit a broadcast station  
11 licensed to Peninsula?

12 A Yes.

13 Q Which station was that?

14 A K274 retransmits KPEN-FM.

15 Q How long had the Kodiak 274 translator been  
16 retransmitting KPEN-FM?

17 A Since it went on the air.

18 Q Has Peninsula ever received from the Commission or  
19 its staff a written waiver to operate the Kodiak 274  
20 translator at variance with the current version of Section  
21 74.1232d of the Rules?

22 A No.

23 Q Did KPEN-FM compete for market share in Kodiak  
24 with KBOK and KRXX after May 19, 2001?

25 A Yes.

1 Q Did KPEN-FM compete for advertising revenues in  
2 Kodiak with KBOK and KRXX after May 19, 2001?

3 A Yes.

4 Q Does Peninsula currently operate an FM translator  
5 that provides programming to the residents of Kodiak on  
6 channel 285?

7 A Yes. No. No, not currently, no.

8 Q You stopped on August 28, 2002?

9 A Yes. Yes.

10 Q Did Peninsula operate the Kodiak 285 translator  
11 continuously from May 19, 2001 to August 28, 2002?

12 A Yes.

13 Q From May 19, 2001 to the termination date **of**  
14 August 28, 2002, did the Kodiak 285 translator retransmit a  
15 broadcast station licensed to Peninsula?

16 A Yes.

17 Q Which station?

18 A KWW-FM.

19 Q How long had the Kodiak 285 translator been  
20 retransmitting KWW-FM?

21 A Approximately 19 years.

22 Q Has Peninsula ever received from the Commission or  
23 its staff a written waiver to operate the Kodiak 285  
24 translator at variance with the current version of Section  
25 74.1232d of the Rules?

1 A No.

2 Q Did KWW-FM compete *for* market share in Kodiak  
3 with KBOK and KRXX after May 19, 2001?

4 A Yes.

5 Q Did KWW-FM compete for advertising revenues in  
6 Kodiak with KBOK and KRXX after May 19, 2001?

7 A Yes.

8 Q Does Peninsula currently operate an FM translator  
9 that provides programming to the residents of Anchor Point  
10 on channel 257?

11 A No.

12 Q It stopped on August 28, 2002?

13 A Yes.

14 Q Did Peninsula operate the Anchor Point translator  
15 continuously from May 19, 2001 to August 28, 2002?

16 A Yes.

17 Q From May 19, 2001 to August 28, 2002, did the  
18 Anchor Point translator retransmit a broadcast station  
19 licensed to Peninsula?

20 A Yes.

21 Q Which station?

22 A KPEN-FM.

23 Q How long had the Anchor Point translator been  
24 retransmitting KPEN-FM?

25 A I guess about 15 years, since its inception.

1           Q     Has Peninsula ever received from the Commission or  
2     its staff a written waiver to operate the Anchor Point  
3     translator at variance with the current version of Section  
4     74.1232d of the Rules?

5           A     No.

6           Q     Did Peninsula compete for advertising revenues in  
7     Anchor Point with any other radio broadcaster after May 19,  
8     2001?

9           A     No.

10          Q     The only commercial broadcasters in that area, I  
11     mean the only commercial broadcaster in that area is  
12     yourself?

13          A     Yes.

14          Q     Does Peninsula currently operate an FM translator  
15     that provides programming to the residents of Homer on  
16     channel 272?

17          A     Yes. No, I'm sorry, say that again?

18          Q     Does Peninsula currently operate --

19          A     No.

20          Q     And it stopped August 28, 2002?

21          A     Yes.

22          Q     Did Peninsula operate the Homer translator  
23     continuously from May 19, 2001 to August 28, 2002?

24          A     Yes.

25          Q     From May 19, 2001 to August 28, 2002, did the

1 Homer translator retransmit a broadcast station licensed to  
2 Peninsula?

3 A Yes.

4 Q Which station?

5 A KPEN-FM.

6 Q How long had the Homer translator been  
7 retransmitting KPEN-FM?

8 A Approximately 15 years, since its inception.

9 Q Has Peninsula ever received from the Commission or  
10 its staff a written waiver to operate the Homer translator  
11 at variance with the current version of Section 74.1232d of  
12 the Rules?

13 A No.

14 Q Does Peninsula currently operate an FM translator  
15 that provides programming to the residents of Kachemak City  
16 on channel 265?

17 A Yes.

18 Q Currently?

19 A Oh, I'm sorry, no.

20 Q I know, I'm putting you to sleep.

21 A No.

22 Q It stopped operating August 28, 2002?

23 A Yes.

24 Q From May 19, 2001 to August 28, 2002, did the  
25 Kachemak City translator retransmit a broadcast station

1 licensed to Peninsula?

2 A Yes

3 Q Which station is that?

4 A KPEN-FM.

5 Q How long had the Kachernak City translator been  
6 retransmitting KPEN-FM?

7 A Approximately 15 years, since its inception.

8 Q Has Peninsula ever received from the Commission or  
9 its staff a written waiver to operate the Kachemak City  
10 translator at variance with the current version of Section  
11 74.1232d of the Rules?

12 A No.

13 Q Did Peninsula compete for advertising revenues in  
14 Kachemak City with any other radio broadcaster after May 19,  
15 2001?

16 A No.

17 Q And did Peninsula communicate for advertising  
18 revenues in Homer with any other radio broadcaster after May  
19 19, 2001?

20 A No.

21 Q You had testified earlier about a footnote 59 that  
22 appears in a 1990 report and order which is Official Notice  
23 4. Would it be fair to state that you claim one  
24 justification for Peninsula's continuing operation of all of  
25 the translators that we've just talked about appears in that



1 footnote?

2           A     This footnote is the heart of our case. The  
3 footnote states in plain language we intend that our  
4 decisions herein not alter in any fashion the special  
5 treatment we accord Alaska Rangel Radio Group and then it  
6 goes on to cite examples of various waivers that have, that  
7 were and have been and continue to be granted pursuant to  
8 the Rangel Radio Group policy, and the order does not  
9 require that a licensee in Alaska reapply for waivers.

10                   The order specifically says that our intent, we  
11 intend our decisions herein not alter in any fashion the  
12 special treatment we accord Alaska.

13                   They cite Rangel Peninsula sought all the  
14 necessary Rangel Radio Group waivers and that's the way it's  
15 been for upwards of 19 years of operation and it's our  
16 position that we weren't required to reseek waivers upon a  
17 license renewal, a routine license renewal in 1996.

18                   Our waivers continued, the underlying waivers  
19 continued in effect through the license renewal process and  
20 it was not incumbent upon us based on this footnote that we  
21 go back and reseek waivers.

22           Q     My question I think is a little bit narrower than  
23 what you've just testified about. So are you saying that  
24 footnote 59 justifies Peninsula's continuing operation of  
25 the seven translators subsequent to May 19, 2001?

1           A     No. Our position is that pursuant to the  
2     Communications Act 307 Section C3, that that provides for  
3     the terms of license and it specifically says that it  
4     provides for continuation of operation pending decision and  
5     the language there specifically notes that licenses continue  
6     in effect, meaning if they had been revoked or terminated or  
7     in our case we don't know, we're not sure our application  
8     for renewal was not granted or it was dismissed, I believe,  
9     but in any event, if you lost your licenses, there is a  
10    provision for them to continue in effect pending a decision  
11    which includes a reference to Section 405 of the  
12    Communications Act and under 405, appeals which are filed  
13    under Section 402 come within the scope of Section 405,  
14    permitting continued operation pursuant to 307C3.

15                So our position is that we had continuing  
16    authority with licenses which may be revoked as has been the  
17    case with every other licensee since 1934 to continue to  
18    operate pending our appeal.

19           Q     Have you made that argument to a court in  
20    connection with a motion to stay the effect of the  
21    Commission's termination order?

22           A     Yes.

23           Q     What was the result of that motion?

24                MR. SOUTHMAYD: Your Honor, I'm going to object.

25    A motion for stay and the court's action on a motion for

1 stay has nothing to do with the merits of particular legal  
2 arguments because there's an entirely different standard, a  
3 much higher standard for issuing a stay.

4 A case may have, may be completely, have complete  
5 merit and the court may agree with it but not agree to issue  
6 a stay because of a failure to show irreparable harm or one  
7 of the other four factors outlined in Washington  
8 Metropolitan--

9 So I object to the suggestion here that the denial  
10 of the court, of a court of a stay request is a decision on  
11 the merits of the argument that Mr. Becker just made. It's  
12 not. It's not relevant to the issue here and it's far  
13 afield.

14 JUDGE SIPPEL: Well, I don't really need to hear a  
15 response to that. I'm going to permit the question and  
16 answer to the extent that the witness is prepared to do it.  
17 Obviously we're in a field here which is at best a mixed  
18 question of fact and law.

19 The fact element really is more on the nature of  
20 the state of mind of the witness and Peninsula than it is,  
21 these are purely legal arguments, but this obviously, this  
22 witness has devoted a significant part of his last couple of  
23 years with how these things parse together, specific  
24 provisions that he's referring to, so and **you** permitted him  
25 to answer the question, so I'm going to permit Mr. Shook to